Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1470

STANLEY M. ROSENBLUM, ROBERT S. GOLDENHERSH, MERLE L. SILVERSTEIN, GENE M. ZAFFT, JACK M. MAZUR and RONALD J. RABEN, d/b/a ROSENBLUM, GOLDENHERSH, SILVERSTEIN & ZAFFT, a Partnership, and EDWARD YAWITZ, FLORENCE YAWITZ, and CLARDEL DRUG COMPANY, a Corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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The Petitioners, STANLEY M. ROSENBLUM, ROBERT S. GOLDENHERSH, MERLE L. SILVERSTEIN, GENE M. ZAFFT, JACK M. MAZUR, RONALD J. RABEN, d/b/a ROSENBLUM, GOLDENHERSH, SILVERSTEIN & ZAFFT, a Partnership, and EDWARD YAWITZ, FLORENCE YAWITZ, and CLARDEL DRUG COMPANY, a Corporation, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceedings on February 2, 1977.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals have not yet been reported, and are reproduced in Appendix A to this petition.

JURISDICTION

The Judgment of the Court below (Appendix B, infra, p. A-17) was entered on February 2, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government, after an income tax deficiency case is pending in the United States Tax Court, deprives the taxpayer of his constitutional due process rights by instituting a huge jeopardy assessment and levy thereon, the effect of which is to totally seize *all* of taxpayer's assets including monies previously paid pursuant to a prior contract to counsel for legal representation in the pending Tax Court case, and thus to prevent him from obtaining the effective assistance of counsel of his choice in said case.

2. Whether taxpayer's attorneys, as plaintiffs, can assert the violation of taxpayer's due process rights to demonstrate that a levy is wrongful.

3. A. Whether attorneys for a taxpayer may proceed under Section 7426, Title 26, United States Code, to recover monies paid to them pursuant to a prior contract by taxpayer for attorney fees, but thereafter seized by the government (pursuant

to jeopardy assessment and levy) under circumstances which demonstrate a violation of taxpayer's due process rights.

B. Whether a levy is "wrongful", and subject to attack under Section 7426, Title 26, United States Code, if it totally seizes all of a taxpayer's assets and prevents him from obtaining counsel for the Tax Court litigation.

STATUTORY PROVISIONS INVOLVED

Title 26, United States Code, Section 7426, set forth in Appendix C (infra, p. A-20).

STATEMENT OF FACTS

This is an action filed pursuant to Section 7426(a)(1) of Title 26, United States Code, to recover money allegedly wrongfully levied upon by the Internal Revenue Service. The Complaint below was in two Counts: Count I pertained to money seized under a jeopardy assessment and levy against taxpayers Edward Yawitz and Florence Yawitz (husband and wife); Count II pertained to money seized under a jeopardy assessment and levy against taxpayer Clardel Drug Company, a corporation. The allegations in the two counts are identical, the only difference being the taxpayers who were the targets of the assessment and levy.

The principal plaintiffs in each count were Stanley M. Rosenblum, Robert S. Goldenhersh, Merle L. Silverstein, Gene M. Zafft, Jack M. Mazur and Ronald J. Raben, doing business as Rosenblum, Goldenhersh, Silverstein & Zafft, a law partnership. The taxpayers also joined as parties plaintiff.

Each count of the petition alleges that taxpayers, prior to September 11, 1974, contracted with the law firm to represent

the taxpayers in civil tax litigation then pending in the United States Tax Court. On September 13, 1974, the government filed jeopardy assessments and levies against the taxpayers. On October 8, 1974, the taxpayers paid legal fees and expenses to the law firm for legal representation in the Tax Court cases ($22,486.05 by the Yawitzs and $19,625.00 by Clardel). These funds were deposited in the law firm's bank account, but were levied upon by the government on November 8, 1974, and were surrendered to the government by the law firm on November 13, 1974. A request by the law firm for return of the money as having been wrongfully levied upon was submitted by the law firm on November 25, 1974, but was disallowed by Internal Revenue Service on February 20, 1975.

The complaint further alleges that plaintiff taxpayers are totally without resources to obtain and compensate counsel if the seized funds are not returned to the law firm; that the cases pending in the Tax Court are complicated and involve sophisticated and involved theories of law and fact, and require the services of experienced and competent tax specialists if taxpayers are to be effectively represented; that taxpayers will be denied due process of law under the Fifth and Sixth Amendments if the government is permitted to seize and retain the very funds used to obtain counsel; and that the result of the government's levy and seizure is to totally deny taxpayers the opportunity to be represented by competent and effective counsel (Complaint, pp. 3-4).

The prayer in each Count seeks an order of court that the seized funds be returned to the law firm (Complaint, p. 4).

In response, the government filed a Motion to Dismiss and a Motion for Summary Judgment, each of which alleged simply that

> "1. This Court lacks subject matter jurisdiction over the action.
>
> 2. The Complaint fails to state any claim upon which relief may be granted."

Thereafter, the district court entered its "Memorandum and Order" (infra, p. A-1), dismissing the complaint "without prejudice", on the basis that the relief sought must be obtained in the Tax Court. In so holding, the court below obviously believed that some relief for taxpayers was in order, but that the district court was not the appropriate forum;

> "The hard-nosed attitude of the Government in the present case is difficult to comprehend. However, much as we sympathize with taxpayers' plight, our authority does not extend to the grant of the relief here prayed for . . . A separate proceeding in this Court to protect the litigating taxpayers against an asserted violation of their constitutional rights is not permissible under the instant facts." (Memorandum and Order, infra, p. A-1).

The Eighth Circuit Court of Appeals thereafter affirmed the District Court. The Court recognized that the problem was "a serious one", and gave trouble to the Tax Court in *Human Engineering Institute v. Commissioner*, 61 T. C. 61, 64-68. Nevertheless, it held that relief could not be granted in this case because (1) the "wrongfulness" mentioned in Section 7426 (a)(1) must relate to the third party claiming the funds, and not to the taxpayer (despite *Griswold v. Connecticut*, 381 U.S. 479), and (2) in any event, the due process claims of the taxpayer arising out of the deprivation of counsel can be appropriately litigated in the Tax Court (infra, p. A-4).

REASONS FOR GRANTING THE WRIT

1. The Opinion Below, Refusing to Allow Attorneys, as Plaintiffs in This Action, to Assert the Deprivation of the Due Process Rights of Their Client, Directly Conflicts With Griswold v. Connecticut, 381 U.S. 479.

The key holding of the opinion below is simply that petitioners, as attorneys for the taxpayer, cannot assert taxpayer's due process rights in order to demonstrate that the jeopardy assessment and levy were "wrongful". The Eighth Circuit reaches this conclusion because Section 7426 (a)(1) allows a third party (but not the taxpayer) to recover property "wrongfully levied upon", and the Court below limits that term to mean wrongful *only* as to the third party, and not wrongful as to the taxpayer. This interpretation imposes a narrow restriction on the statute's application which is nowhere expressed by the statutory language itself; moreover, and of far greater consequence, it openly rejects the rule established in *Griswold v. Connecticut*, 381 U. S. 479, and reemphasized and extended in *Eisenstadt v. Baird*, 405 U. S. 438.

Griswold, of course, announced that a doctor, because of the professional relationship, could assert the constitutional rights of his patients. The Eighth Circuit attempts to distinguish this holding on the grounds that there the physician was charged with aiding and abetting the principals (his patients) in the commission of a crime, and hence was virtually in the same legal position as the patients, whereas in the instant case the law firm was bringing an action (under Section 7426) which its clients were precluded from bringing. This so-called distinction is a complete misinterpretation of *Griswold*. There the professional relationship of doctor-patient, in and of itself and with nothing more, was held sufficient to give the physician standing to assert the constitutional deprivations regarding the patient, just as the vendor-vendee relationship was sufficient in *Barrows v. Jackson*,

346 U. S. 249. The additional element of principal-accessory was discussed in *Griswold* only as the basis for the giving the matter a "case or controversy" status under Article III of the Constitution.[1] Substantively, therefore, the instant case is not distinguishable from *Griswold*, for certainly the lawyer-client relationship is of equal professional status to that of doctor-patient. On that basis, a levy which is "wrongful" as to a taxpayer because of due process deprivation is subject to a Section 7426 attack by taxpayer's attorney under the circumstances of the instant case.

This is not a situation that can, or should be, resolved by resort to procedural technicalities or fine distinctions, as the court below attempted to do in avoiding the *Griswold* mandate. Rather it is a case involving substantial and far-reaching principles which should be decided in a manner consistent with decisional precedents dealing with constitutional law and due process. The author of the opinion below actually recognized this, for the opening line of his opinion (after a recitation of the facts) reads:

> "The question of whether the IRS may, agreeably with the due process clause, seize all of a taxpayer's money and property on the basis of a jeopardy assessment and thereby render the taxpayer financially unable to adjudicate his tax liability in the Tax Court or otherwise is a serious one." (Opinion below, Appendix A-9-A-10).

For this reason alone, certiorari should be granted so that this Court can carefully examine the substantive constitutional issues involved and resolve them in a manner consistent with *Griswold v. Connecticut*, and thereby eliminate the weakening of that decision which the opinion below has created.

---

[1] Here there can be no question but that the law firm has a justiciable interest to litigate, since the funds in question were actually paid to the firm pursuant to a prior contract to provide legal services for the Taxpayers.

2. **The Opinion Below, Deferring the Entire Issue to a Later Determination by the Tax Court, Contravenes Commissioner v. Shapiro, 424 U.S. 614, and Undercuts the Due Process Requirements in Jeopardy Assessment Cases First Announced in Phillips v. Commissioner, 283 U. S. 589.**

Both the District Court and Court of Appeals below recognized the gravity of the situation, but each court, apparently with some reluctance, deferred the matter to the Tax Court. The district judge, for example, commented that "much as we sympathize with taxpayers' plight, our authority does not extend to the grant of the relief here prayed for" (Appendix A, infra, p. A-1), and the Eighth Circuit echoed this belief by concluding that "we will repeat and emphasize that the taxpayers are free to advance their due process claim in the Tax Court" (Appendix A, infra, p. A-4). But this type of summary deferral to the Tax Court was the very concept which was rejected by this Court in *Commissioner v. Shapiro*, 424 U. S. 614, in which it was recognized that there may well be a seizure of assets under circumstances where the injury to the taxpayer "cannot be adequately remedied by a Tax Court judgment in his favor." In the instant case the circumstances are even more compelling than in *Shapiro*, for here, without an immediate remedy in the district court, the taxpayers are *foreclosed* from a favorable Tax Court judgment because they will have no advocate before that court. This whole procedure thus utterly defies the due process requirements in regard to jeopardy assessments, as first laid down in *Phillips v. Commissioner*, 283 U. S. 589, wherein such assessments and subsequent levies were held permissible only where "*adequate* opportunity is afforded for a later judicial determination of the legal rights." In the instant case, where the totality of the levy deprives the taxpayer of effective representation by counsel, no *adequate* opportunity for later judicial determination exists, and the fears expressed in *Shapiro* have become reality.

The opinion below, therefore, demonstrates a radical departure from the due process requirements heretofore established by this Court in jeopardy assessment matters. It relegates the taxpayer to a much later Tax Court trial at which he will have no effective counsel, because the very Internal Revenue Service procedure which would be the subject matter of the litigation will have already deprived him of any ability to obtain counsel. Such a judicial proceeding can by no stretch of the imagination be considered "adequate" (see *Phillips*), nor does it satisfy the due process requirements of a "predeprivation or prompt post-deprivation hearing" as emphasized in *Shapiro*. Petitioners therefore urge that the Eighth Circuit decision be reviewed so that these stark inconsistencies can be eliminated, explained, or otherwise remedied.

3. **The Decision Below Should Be Reviewed as an Important Matter in the Ever Expanding Area of Jeopardy Assessments and Levies, to Determine Whether IRS Shall Retain the Omnipotent Power to Destroy Any Taxpayer by the Methods Here Involved.**

Quite apart from the obvious conflicts with existing Supreme Court authorities, the instant case is one which urgently requires review by this Court because of the tremendous impact it will have in the field of tax collection, and particularly because of the unfettered power it extends to the Internal Revenue Service. This Court has recognized and turned its attention in *Laing v. United States*, 423 U. S. 161, and *Shapiro* to the awesome possible abuses of power given the Internal Revenue Service by the jeopardy assessment. In the Tax Reform Act of 1976 Congress has exhibited its concern in enacting new Code Section 7429 "Review of Jeopardy Assessment Procedures." That concern and attention should be further addressed by this Court which should take the opportunity to teach that what is "reasonable" and "appropriate" under the "circum-

stances" is and has always been subject to constitutional guarantees of due process—both before and after the adoption of Section 7429 of the Tax Reform Act of 1976. If the decision below is allowed to stand, any taxpayer targeted by the service can be totally destroyed by a jeopardy assessment and levy sufficient to attach all of his assets and prevent him from hiring effective counsel to resist and litigate the tax charges. A stamp of approval on this sort of procedure reduces the due process guarantees to empty and meaningless words, and elevates the Internal Revenue Service to a super-power status with the capability of stripping any taxpayer litigant of the legal resources to resist its demands.

This problem was certainly recognized by the Tax Court in *Human Engineering Institute v. Commissioner*, 61 T. C. 61, referred to in the opinion below, wherein great concern was expressed for a taxpayer left defenseless by a huge jeopardy assessment and levy, but the issue was moot because there the taxpayer was able to borrow funds to retain counsel. But what of the taxpayer who does not have that ability? Must he appear in the Tax Court defenseless, and hope that the court of its own initiative (for taxpayer will not have counsel to raise the issues) will assert and consider his due process and other defenses?

Petitioners thus submit that the possible consequences flowing from the decision below strike at the very roots of our judicial processes, and a Supreme Court review is essential to define the real limits which the due process clause mandates in jeopardy procedures.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States District Court
Eastern District of Missouri
Eastern Division

Stanley M. Rosenblum, et al.,
Plaintiffs,
vs.
United States of America,
Defendant.
} No. 75-731C (2).

Memorandum and Order

(Filed February 23, 1976)

Following the September 9, 1974 conviction of plaintiff Edward Yawitz on charges of evasion of federal income taxes, the Internal Revenue Service made jeopardy tax assessments totalling several hundreds of thousands of dollars against Yawitz, his wife, and Clardel Drug Company (collectively referred to as taxpayers). Demand for payment was given and on September 16, 1974 notice of federal tax liens were duly filed. Litigation is now pending in the United States Tax Court with respect to the tax assessments.

On about September 11, 1974, taxpayers contracted with the law firm of Rosenblum, Goldenhersh, Silverstein and Zafft (collectively referred to as the law firm) to represent them in the Tax Court litigation and any subsequent appeals. About a month later, the taxpayers paid law firm sums aggregating in excess of $40,000 in payment of agreed fees for representing taxpayers in the tax litigation and the anticipated costs in connection therewith. The moneys were deposited in

special bank accounts. Law firm notified IRS, whereupon levies were served on law firm on November 8, 1974, and on November 13, 1974, the money was surrendered to an agent of the IRS in response to the levies. Requests for the return of the moneys were disallowed.

Alleging that the combination of the jeopardy assessments, tax lien notices and levies, whereby the Government seized the moneys they paid for counsel fees and expenses, has effectively deprived taxpayers of an opportunity to defend their property interests in the tax litigation, in violation of the Fifth and Sixth Amendments to the Constitution of the United States, this suit was filed for the return of the moneys to the law firm. The Government has moved to dismiss and for summary judgment.

There can be no question but that the law firm received the moneys in November, 1974, fully encumbered by the federal tax liens, and that insofar as the law firm is concerned, it has no protectable interest in the moneys which were seized by the IRS. See Sections 6321 and 6323(a), 26 U.S.C. Prior to the receipt of the moneys and the levies, the law firm was simply a contract creditor, a status which gave it no rights to the funds subsequently paid to it. No facts are alleged (and the law firm asserts only the constitutional claims of taxpayers) to support the conclusory allegation that the moneys were "wrongfully" collected. And insofar as taxpayers are concerned, the sole basis of their claims is that by virtue of the totality of the government's seizure of their assets, they will have been rendered helpless to prosecute the Tax Court proceedings unless funds are released to enable them to compensate competent counsel such as plaintiff law firm. These facts are not disputed by the Government.

In this situation what was said in *Human Engineering Institute v. Kopas*, 61 T.C. 61, 64-65, is appropos:

> "A taxpayer who is faced with a trial of a claim against him by the Federal Government for alleged unpaid taxes and whose total assets have been subjected to a jeopardy assessment by that same Government, is in a difficult position. In such a situation, the judicial mind instinctively wonders how such taxpayer can be protected in terms of the trial and about the extent to which his constitutional guarantees, particularly under the due process clause of the fifth amendment, are involved. That wonder is broadened where the taxpayer also asserts that the Commissioner of Internal Revenue has acted arbitrarily and capriciously in respect of the jeopardy assessment and/or the deficiency notices in violation of claimed constitutional rights."

The hard-nosed attitude of the Government in the present case is difficult to comprehend. However, much as we sympathize with taxpayers' plight, our authority does not extend to the grant of the relief here prayed for. In *Human Engineering*, the Court noted (l.c. 67-68) that situations may exist "where some action by the trial judge may be indicated to avoid placing an undue burden on the court or to protect the integrity of the judicial process." Whether such action is appropriate in the circumstances of the present case is, however, for the Tax Court to determine. A separate proceeding in *this* Court to protect the litigating taxpayers against an asserted violation of their constitutional rights is not permissible under the instant facts. It follows that the complaint should be dismissed without prejudice.

Dated this 23rd day of February, 1976.

/s/ JOHN K. REGAN
United States District Judge

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1241

Stanley M. Rosenblum, Robert S. Goldenhersh, Merle L. Silverstein, Gene M. Zafft, Jack M. Mazur, Ronald J. Raben, d/b/a Rosenblum, Goldenhersh, Silverstein & Zafft, a Partnership, and Edward Yawitz and Florence Yawitz, his wife, and Clardel Drug Company, a Corporation,

Appellants,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 12, 1976

Filed: February 2, 1977

Before Van Oosterhout, Senior Circuit Judge, Heaney and Henley, Circuit Judges.

Henley, Circuit Judge.

This is an action brought in the United States District Court for the Eastern District of Missouri against the United States pursuant to 26 U.S.C. § 7426(a) by the members of the Clayton, Missouri law firm of Rosenblum, Goldenhersh, Silverstein & Zafft (hereinafter Rosenblum), and by Edward Yawitz and Florence Yawitz, his wife, and Clardel Drug Company, a corporation (hereinafter taxpayers). The purpose of the suit is to recover from the government approximately $42,000.00 that was paid to Rosenblum by taxpayers as an attorney's fee and to defray expenses in connection with Rosenblum's agreement to represent the taxpayers in litigation pending in the Tax Court of the United States; prior to the payment of the money to Rosenblum, the Commissioner of Internal Revenue had made a jeopardy assessment of income taxes against the taxpayers and had filed notices of tax liens; after the payment had been made, the Internal Revenue Service levied on all of the assets of the taxpayers and also levied upon the moneys paid to Rosenblum. A demand on the IRS for release of the money was refused, and this action was instituted. Subject matter jurisdiction is predicated upon 26 U.S.C. §§ 1346(a)(1) and 1346(e).[1]

The theory of the plaintiffs is that the "totality" of the seizure by the IRS, including the seizure of the money paid to Rosenblum, has deprived the taxpayers of their alleged constitutional right to be represented by competent tax counsel in the litigation that taxpayers have pending in the Tax Court, which litigation plaintiffs describe as being complicated and technical.[2]

The suit was filed in August, 1975. The government filed a motion to dismiss the complaint and a later motion for summary judgment alleging that the district court lacked subject matter jurisdiction, and that the complaint failed to state a claim upon which relief could be granted.

---

[1] The complaint also makes reference to 28 U.S.C. § 2410; that section does not appear to us to be pertinent.

[2] Plaintiffs refer to both the fifth and sixth amendments to the Constitution of the United States. We call attention to the fact that the sixth amendment is limited in application to criminal prosecutions.

On February 23, 1976 the district court[3] filed a memorandum opinion and entered a judgment dismissing the complaint without prejudice. The view of the district court was that Rosenblum had no protectable interest in the moneys that were seized, and that the constitutional claim of the taxpayers would have to be raised in the Tax Court and could not be adjudicated in the district court. Disagreeing with the district court in both respects, plaintiffs filed a timely notice of appeal.

The facts of the case are mostly undisputed.

Edward Yawitz and Florence Yawitz are husband and wife, and they reside in St. Louis County, Missouri. It is inferable that they are interested in and probably control the third taxpayer, Clardel Drug Company.

It seems clear that for a number of years prior to September, 1974 the taxpayers had been in controversy with the IRS with respect to their income tax liabilities, including civil fraud penalties and that they had cases pending in the Tax Court. Apparently, there were six of those cases, three instituted by the individual taxpayers and three instituted by the corporate taxpayer. Judging from Tax Court docket numbers appearing in the complaint, it may be inferred that the Tax Court proceedings were instituted in 1972, 1973 and 1974.

On September 9, 1974 Mr. Yawitz entered a plea of guilty in federal court to a charge of fraudulent evasion of federal income taxes due with respect to calendar year 1968. Immediately thereafter the Commissioner made jeopardy assessments against the taxpayers covering all asserted income tax liabilities on their part. Demand for payment was made on the taxpayers with which demand there was no compliance, and on September 16, 1974 the IRS filed notices of tax liens.

[3] The Honorable John K. Regan, United States District Judge.

In the meantime, on September 11, 1974, taxpayers employed Rosenblum to represent them in the litigation pending in the Tax Court. The individual taxpayers agreed to pay Rosenblum a fee of $20,000.00 and to advance expenses of litigation amounting to $2486.05. The corporate taxpayer agreed to pay a fee of $19,625.00. Those sums were in fact paid over to Rosenblum not later than October 8, 1974, and were deposited in three separate special bank accounts in a Clayton, Missouri bank. When the payments were made, Rosenblum was on constructive notice of the government's tax liens, and it is quite possible that Rosenblum had actual knowledge that the liens had been perfected.

Between October 8 and November 8, 1974 Rosenblum notified the IRS that it had received the payments from the taxpayers.

On November 8, 1974 the IRS served a notice of levy on Rosenblum calling upon it to turn over to the IRS the moneys that it had received from the taxpayers. On November 13, 1974 Rosenblum complied with the demand and surrendered the money. On November 25, 1974 Rosenblum requested the IRS by letter to return the moneys to the law firm; that request was denied by letter on February 20, 1975. This action was commenced on August 18 of that year.

The complaint is in two counts. The first count sets out the claim of Rosenblum and of the individual taxpayers for a return of the $22,486.05 paid by those taxpayers to Rosenblum. The second count sets out the claim of Rosenblum and the corporate taxpayer for the return of the $19,625.00 paid to Rosenblum by that taxpayer. Aside from differences in parties and amounts, the two counts are essentially identical.

Count I of the complaint alleges[4] that the cases of the individual taxpayers in the Tax Court are complicated and are

[4] Comparable allegations appear in Count II.

based on sophisticated theories of law and fact and that the individual taxpayers are required to refute allegations of fraud, to establish the status of Mrs. Yawitz as an "innocent spouse," and to sustain the burden of proof on the non-fraud issues in the cases which involve substantial amounts of money.[5] It is said that in order to properly present the cases the taxpayers require the assistance of competent, expert and experienced tax counsel who will be required to work on the cases for many hours, and that at the present time the IRS has requested pretrial and administrative conferences at which the taxpayers will requre vigorous and skilled representation.

It is further alleged that the taxpayers will not be able to obtain competent counsel unless they are able to compensate such counsel; that the taxpayers believe that Rosenblum is competent to represent them properly and has requested it to do so; that Rosenblum is willing to represent the taxpayers "but is unwilling to do so without fair compensation."

And Paragraph 13 of Count I alleges:

> (13) That unless the aforesaid sum of Twenty-Two Thousand Four Hundred Eighty-Six Dollars and Five Cents ($22,486.05) is released by the Internal Revenue Service, plaintiffs Yawitz will be unable to retain competent counsel, and to pay said necessary costs and expenses, and will suffer adversely therefrom, and will be deprived of their property without due process of law in contravention of the Fifth and Sixth Amendments to the Constitution of the United States. Plaintiffs Yawitz are denied due process when the defendant United States (respondent in said pending civil tax cases) is permitted to seize the very money which plaintiffs Yawitz used to secure counsel to defend

[5] The district court stated that the amounts of the assessments made by the Commissioner total several hundreds of thousands of dollars.

> their property interests. The defendant has heretofore levied and seized upon the money and property which plaintiffs Yawitz paid to retain said Rosenblum and for said necessary expenses to protect said property interests as aforesaid; the result of said levy and seizure is that plaintiffs Yawitz are totally and effectively denied the opportunity and right to be represented by competent and retained counsel and denied the opportunity for an adequate, full, adversary and fair hearing, all contrary to the aforesaid amendments to the Constitution of the United States.

The government does not deny the factual allegations that have been mentioned, and for present purposes we will accept them as true. The government, of course, does not admit the validity of the conclusions of law that are alleged in the two counts of the complaint. And we are not required to accept those conclusions. Specifically, the government does not admit, nor do we necessarily accept, the validity of plaintiffs' allegations that the seizure of the money was wrongful and that unless the money is returned to Rosenblum the taxpayers will be denied due process of law in connection with the proceedings in the Tax Court.[6]

I

The question of whether the IRS may, agreeably with the due process clause, seize all of a taxpayer's money and property

[6] We note at this point that the plaintiffs do not contend that the federal statutes which authorize the government to collect taxes summarily by means of jeopardy assessments and levies in advance of judicial determinations of tax liabilities are unconstitutional. Such a contention would be untenable today. Since *Phillips v. Commissioner of Internal Revenue*, 238 U.S. 589 (1931), was decided it has been established that summary procedures for the collection of internal revenue taxes are not violative of the due process clause of the fifth amendment so long as the taxpayer has a post-collection judicial remedy whereby he may obtain an adjudication of his tax liability.

on the basis of a jeopardy assessment and thereby render the taxpayer financially unable to adjudicate his tax liability in the Tax Court or otherwise is a serious one. And it gave trouble to the Tax Court in *Human Engineering Institute v. Commissioner of Internal Revenue*, 61 T.C. 61, 64-68 (1973), the opinion in which case was referred to by the district court in this case. While the Tax Court raised the question and expressed concern about it, the court found it unnecessary to decide the question because the taxpayers had in fact been able to raise funds to finance their Tax Court litigation.

While the constitutional question just mentioned is serious, the precise question before us at the moment is whether the plaintiffs were entitled to litigate the constitutional issue in the district court within the framework of this case.

We agree with the district court that plaintiffs were not so entitled.

II

United States district courts are courts of limited jurisdiction, and it is necessary to look at the pertinent jurisdictional statutes.

Under 28 U.S.C. § 1346(a)(1) the district courts have jurisdiction of suits brought against the United States to recover internal revenue taxes and penalties erroneously or illegally assessed or collected. And § 1346(e) gives the district courts specific jurisdiction with respect to suits brought under 26 U.S.C. § 7426, which is the statute invoked by plaintiffs in this case.

However, 26 U.S.C. § 7421(a), which is often called the anti-injunction statute, prohibits, with certain exceptions including suits brought under § 7426(a)(1) and (b), suits by taxpayers to

restrain the assessment or collection of any tax imposed by the internal revenue laws. The constitutionality of that section is established and is not questioned here.

Section 7426(a)(1) is as follows:

> (a) Actions permitted.—
>
> (1) Wrongful levy.—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

Section 7426(b), insofar as here pertinent, provides:

> (b) Adjudication.—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:
>
> (1) Injunction.—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.
>
> (2) Recovery of property.—If the court determines that such property has been wrongfully levied upon, the court may—
>
> (A) order the return of specific property if the United States is in possession of such property;
>
> (B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

We think that the complaint in the case may fairly be construed as actually setting out two separate and distinct claims for relief.

One of those claims is that of Rosenblum in its own right. It contends that the money in question belonged to it and that it was wrongfully seized by the IRS. The only jurisdictional basis for that claim is § 7426(a)(1).

The other claim is the personal claim of the taxpayers which amounts to an assertion that they have a personal right to have the seized moneys returned to Rosenblum to compensate that law firm for representing plaintiffs in the Tax Court. That claim obviously cannot be maintained under § 7426(a)(1) because the remedy provided by that statute is not available to taxpayers. And prosecution of the claim is barred by § 7421(a) unless the taxpayers fall within a narrow exception to the applicability of that section which exception we will mention in due course.

III

In order for Rosenblum to prevail on its own § 7426 claim it must appear that it claims an interest in the money, which it does, and that the seizure of the money by the government was "wrongful."

While § 7421, the anti-injunction statute, is an old statute, what is now § 7426(a)(1) and (b) came into the Internal Revenue Code as part of the Federal Tax Lien Act of 1966. And the purpose of the statute was to give a judicial remedy to a person whose property is wrongfully seized to satisfy the tax liability of someone else. Senate Report No. 1708, 89th Congress, 2d Ses-

sion, 1966, U. S. Code Congressional & Administrative News, p. 3751; *Rosenbaum v. United States*, 346 F.Supp. 872, 873 (D. Md. 1972); *Sylk v. United States*, 331 F.Supp. 661, 664 (E.D. Pa. 1971). As a matter of fact, the statute appears to be in effect a codification of the decisional rule laid down in eariler cases that a suit to enjoin a wrongful taking of the property of one person to satisfy another's tax obligation was not barred by the anti-injunction statute itself. *See, e.g., Moore v. Hanson*, 325 F.2d 784 (5th Cir. 1964); *Holland v. Nix*, 214 F.2d 317 (5th Cir. 1954); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ullman*, 110 F.2d 590 (3d Cir. 1940).

It is clear that as between the taxpayers and Rosenblum legal title to the money passed to the latter when it was paid over by the former. We are satisfied, however, that Rosenblum's title to the money was subject to the prior tax lien of the government, and that Rosenblum is entitled to a return of the money only on the theory that the seizure was wrongful.

Rosenblum's claim of a "wrongful" seizure is based on the proposition that the seizure deprived the taxpayers of their alleged constitutional right to be represented by competent counsel in the Tax Court proceedings.

We do not think that the Rosenblum claim can be sustained on that theory. In our view the term "wrongfully levied upon" used in § 7426(a)(1) means seized wrongfully in relation to the third person who is bringing the suit and not merely wrongful in relation to a taxpayer who may suffer from the collateral effects of the seizure. In other words, the "wrong" contemplated by the statute is that suffered by the third person when his property is taken to satisfy the tax obligation of another, and not some "wrong" that the taxpayer may suffer because the government has seized property which the taxpayer has transferred to the third person.

We consider inapposite the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), cited by plaintiffs. That case holds that a person charged with aiding and abetting the violation of a criminal statute may rely as a defense on the fact that the statute is unconstitutional as to the principals involved. It does not follow that a firm of tax lawyers may use an alleged deprivation of a constitutional right of its taxpayer clients as a sword for the purpose of maintaining a suit against the government which the taxpayers themselves are lawfully precluded from bringing.[7]

IV

It has been observed that taxpayers themselves cannot maintain this action unless they fall within an exception to § 7421(a) other than the exceptions mentioned in that section.

The unmentioned exception relied on by the taxpayers here is that § 7421(a) is not applicable where the Commissioner's assessment is so baseless that the Commissioner has no chance of prevailing ultimately in the controversy and where to permit the assessment and levy to stand in advance of final adjudication of the taxpayer's liability would subject the taxpayer to irreparable harm. That exception was recognized in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932); and in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). It was recognized most recently in *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614 (1976), a case decided a few days after the district court decided the instant case and on which decision plaintiffs lay a good deal of stress.

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[7] While it does not appear that the government in resisting the Rosenblum claim makes any argument based on § 7426(c), we call attention to the fact that the subsection just cited provides that for purposes of a suit under § 7426 the underlying assessment of the Commissioner is conclusively presumed to be valid. And if that conclusive presumption is indulged with respect to the statutory claim of Rosenblum, then the taxpayers' claims in the Tax Court are without merit, and they stand in no need of representation in that court.

No useful purpose would be served by outlining the rather unusual facts that were presented in the *Shapiro* case or undertaking to compare them in detail with the facts in the instant case. Suffice it to say that in our opinion this case does not present the urgent situation that was presented in *Shapiro*, and it does not appear to us that to leave the levy in question undisturbed would work such irreparable harm to the taxpayers as to call for the exercise of the equity jurisdiction of the court to grant relief despite the prohibition of § 7421(a).

The civil tax controversy between the taxpayers and the government is before the Tax court, and the taxpayers are free to contend before that court that it is a violation of due process for the government to impose ruinous assessments upon them while at the time time stripping them of the financial means necessary to enable them to litigate the assessments effectively. As has been seen, the Tax Court has been concerned with the problem presented by a case like this, and we will not presume that the Tax Court is either unable or unwilling to grant the taxpayers any appropriate relief to which they may be entitled, or that the Tax Court will not afford the taxpayers a fair and adequate hearing in connection with the proceedings in that court. It should be kept in mind that assuming arguendo that the taxpayers have a constitutional right to be represented by competent counsel in connection with the Tax Court proceedings, it does not follow that they have a constitutional right to be represented by a particular law firm for a particular fee agreed upon in advance.

Apart from the question of irreparable harm, there is the question of whether the assessments of the Commissioner are so baseless that he has no chance of prevailing in the Tax Court. We think it highly doubtful that that question could be answered favorably to the taxpayers, particularly in view of the plea of guilty entered by Mr. Yawitz to a charge of criminal tax evasion.

In conclusion, we will repeat and emphasize that the taxpay-

ers are free to advance their due process claim in the Tax Court. The government so concedes. If that court fails to give the taxpayers relief with respect to their financial difficulties, and if the ultimate decision of the Tax Court is adverse to the taxpayers, that decision will be subject to review here, and we can then consider whether in the proceedings before the Tax Court the taxpayers were denied due process of law.

The judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

In the United States District Court, Eastern District of Missouri, Eastern Division

Stanley M. Rosenblum, et al.,
Plaintiffs,
vs.
United States of America,
Defendant.
No. 75-731C (2)

JUDGMENT

(Filed February 23, 1976)

The Court having this day entered its Memorandum and Order herein,

Now Therefore, in accordance therewith, It Is Hereby Ordered and Adjudged that this action be and the same is hereby dismissed without prejudice.

Dated this 23rd day of February, 1976.

/s/ JOHN K. REGAN
United States District Judge

United States Court of Appeals for the Eighth Circuit

No. 76-1241 September Term, 1976

Stanley M. Rosenblum, Robert S. Goldenhersh, Merle L. Silverstein, Gene M. Zafft, Jack M. Mazur, Ronald J. Raben d/b/a Rosenblum, Goldenhersh, Silverstein & Zafft, Edward Yawitz, Florence Yawitz, and Clardel Drug Co.,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

(Filed February 24, 1977)

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

February 2, 1977

Costs taxed in favor of Appellee:

Costs of printing 10 copies of brief:	$66.00
Total costs of Appellee for recovery from Appellants in the U. S. District Court:	$66.00

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit.

February 23, 1977

APPENDIX C

Title 26, United States Code

§ 7426. Civil actions by persons other than taxpayers

(a) Actions permitted.—

(1) Wrongful levy.—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

(2) Surplus proceeds.—If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds.—If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(b) Adjudication.—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property.—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the Unted States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) Surplus proceeds.—If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds.—If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325 (b) (3) (relating to substitution of proceeds of sale),

the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) Validity of assessment.—For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) Limitation on rights of action.—No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) Substitution of United States as party.—If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party to such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(f) Provision inapplicable.—The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest.—Interest shall be allowed at the rate of 6 percent per annum—

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

Title 28, United States Code

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 91, 63 Stat. 103.